No. 20,770

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE,
a California corporation, et al.,
Appellants,

vs.

GENERAL ELECTRIC COMPANY,
a New York corporation, et al.,
Appellees.

BRIEF OF APPELLEE RADIO CORPORATION OF AMERICA

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BRIEF OF APPELLEE RADIO CORPORATION OF AMERICA

STATEMENT OF JURISDICTION

The District Court had jurisdiction of the actions brought by appellants against appellees, including Radio Corporation of America (hereinafter referred to as "RCA"), under sections 4 and 16 of the Act of October 15, 1914 (the Clayton Act), 38 Stat. 731, 737, 15 U.S.C. 15, 26 (R.[1] 1-14, 15-27).

[1]As in appellants' opening brief, the clerk's transcript of record will be cited in this brief as "R."; the reporter's transcript of the oral proceeding at trial will be cited as "Tr." The transcripts of the pretrial hearings will be referred to by date and subject matter (e.g., "Rep.Tr. of Hearing on Motion, Dec. 30, 1964"). Exhibits admitted into evidence will be cited "Exh." Exhibits not admitted into evidence but marked for identification will be cited "Exh. for Ident."

The District Court had jurisdiction pursuant to Rules 50(a) and 41(b) of the Federal Rules of Civil Procedure to grant a directed verdict and dismissal of the action as to appellee RCA at the close of the evidence offered by appellants.

Judgment was entered in favor of appellee RCA on November 26, 1965 (R. 1977). Appellants filed their notice of appeal on December 1, 1965 (R. 2048). This Court has jurisdiction over the appeal under Title 28 of the United States Code, section 1291.

PRELIMINARY STATEMENT

In prosecuting their appeal against RCA, appellants have the burden of establishing that there was evidence which would support two propositions:

(1) That there was a conspiracy to boycott appellants; and

(2) That RCA was a party to such conspiracy.

We respectfully submit that appellants did not present any evidence which would support the first proposition. But *even if it be assumed* that appellants have presented sufficient evidence to allow a jury to infer the existence of a conspiracy, they did not introduce any evidence from which a jury could reasonably infer that RCA was a party to such a conspiracy.

RCA has been and is a manufacturer of television sets. It was not in the business of distributing television sets to retailers in Northern California. On the contrary, RCA sold the television sets it manufactured to an independent

distributor. That distributor decided to which retailers it would resell those sets. Appellants have not shown—and cannot show—that RCA participated in those decisions or attempted to control the price at which retailers sold television sets. There is just no evidence, nor is there any reasonable inference from the evidence, to support appellants' claim against RCA.

STATEMENT OF THE CASE

RCA did not sell to retailers in San Francisco; it sold only to distributors (Tr. 4545-4546). RCA-manufactured television sets were distributed in Northern California by Leo J. Meyberg Co., by its successor, A. H. Meyer Co., and after May 31, 1965, by Calectron, Inc. (App.Opn.Br., p. 10). These distributors will be collectively referred to as "Meyer."

The evidence showed without contradiction that Meyer purchased television sets from RCA, f.o.b. point of shipment; that Meyer paid the freight; and that Meyer determined to whom it would sell television sets and did not discuss those decisions with any representative of RCA (Exh. 88; Tr. 1332-1336, 4546). The distributor's merchandise was its own property, and RCA made no attempt to aid distributors in disposing of unsold merchandise (Tr. 4611-4613).

Appellants point out that national firms avail themselves of lower local newspaper advertising rates by making funds available to local concerns for local advertisement of the national product (App.Opn.Br., p. 30). Dis-

tributors of television sets manufactured by RCA received "cooperative" advertising funds[2] from RCA, based upon the amount of their purchases, to be used as the distributors saw fit for local advertising by the distributor, retail dealers, or both (Exh. 99, pp. 2-3). Whenever RCA thought that more local advertising was advisable, distributors desiring to participate would receive supplemental cooperative advertising funds (Tr. 4558-4559; Exh. 99, p. 3). Distributors obtained credit for these funds from RCA by submitting requests containing substantiation of the advertisement to an independent advertising agency (Exh. 99, pp. 28-31).

RCA's contributions were made with the understanding the distributor would "accord all competing [retail] dealers proportionately equal treatment" (Exh. 99, p. 2; Tr. 4615). However, the funds were expended by the distributor at its discretion (Exh. 99, p. 1). Thus, Meyer determined which retailers would participate and the terms on which they would participate in cooperative advertising funds (Tr. 1334).

In order to maintain the commercial value of RCA trademarks, RCA did stipulate that "any advertising which is misleading or, because of its bad taste, unfair product comparisons or other deceptive or questionable advertising techniques, contrary to the established policies of RCA, is not eligible against Co-op funds" (Exh. 99, p.

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[2]The funds are cooperative because both the distributor and RCA contribute to them (Exh. 99, p. 4).

10; Tr. 4617-4618), but RCA did not care whether advertisements showed less than suggested prices (Tr. 4606).

RCA also provided suggested retail prices to its distributor, Meyer, but Meyer was not required to and did not follow those suggested prices (Tr. 1242-1245; Exhs. 1947, 1948, 5114, 5116).[3]

After appellants filed their first complaint (R. 1-14), they wrote to RCA on September 25, 1961, and again on November 20, 1963, requesting that RCA sell directly to them (Exhs. 1692, 1698).[4] RCA referred these letters to Meyer (Exhs. 1695, 1697).

In the meanwhile, as appellants point out (App.Opn.Br., pp. 59-60), Meyer received a request from appellants in June, 1960, to sell them television sets manufactured by RCA, but Meyer refused to do so. This determination by Meyer was made without any consultation with RCA (Tr. 4728, 4742, 4743).

Appellants settled the action insofar as Meyer was concerned (R. 1914). No settlement, however, was made with RCA, and the case proceeded to trial. At the close of plaintiffs' case, RCA moved for a directed verdict and dismissal of the action as to it (Tr. 6723; R. 1807), which motion was granted (Tr. 6916; R. 1928-1929).

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[3]The labored attempt of appellants to show uniformity between RCA's and Meyer's suggested resale prices (Exhs. 5114, 5116) in fact shows that 58.98 per cent of the prices were different, even excluding all those instances when Meyer had, but RCA did not have, suggested resale prices.

[4]Appellants also claim that they had written to RCA on July 13, 1960 (Exh. for Ident. 1691)—one month prior to the lawsuit—but that letter was never received by RCA (Tr. 4561, 4710).

SUMMARY OF THE ARGUMENT

The District Court dismissed RCA from the actions because "[t]here is no evidence that RCA conspired with anyone" (R. 1923) and "no evidence from which a jury could reasonably or fairly infer that RCA participated in or had knowledge of a conspiracy" (R. 1928).

Appellants have not and, we submit, cannot point to any evidence which would refute those determinations.

Appellants rely on the doctrine of conscious parallelism, but defendants' conduct was not parallel and, in any event, conscious parallelism is not in itself sufficient to establish a conspiracy.

Appellants rely on evidence that RCA furnished suggested retail price lists to its independent distributor, but RCA's suggested prices were only suggested guide lines, which were disregarded whenever the distributor wished to do so. There is no evidence that RCA's suggested lists were even shown to retailers. RCA was simply unconcerned with the prices charged by retailers in San Francisco.

Although RCA furnished its *distributor* with funds to be used in advertising RCA-manufactured television sets as part of its cooperative advertising policy, those funds were expended solely by the distributor and were not used by RCA to control prices.

The distributor to which RCA sold its television sets in San Francisco was not the agent of RCA.

RCA did not give, or have anything to do with, any special treatment alleged to have been given to any competitor of appellants in San Francisco.

For the foregoing reasons, as the court below held, appellants "failed to make a case against RCA" (R. 1928). Not content with arguing this basic issue, appellants also attack virtually every adverse ruling on discovery, the admission of evidence, pretrial settlement of issues and procedure and also taxation of costs. Our answer to those charges, insofar as they pertain to RCA, may be summarized as follows:

Appellants' assertions of abuse of discretion with respect to the discovery orders pertaining to RCA find no basis in the record. Nor is there any support for appellants' contentions with respect to the trial court's evidentiary rulings. Most of the excluded exhibits or testimony on which appellants rely were hearsay, or without any proper foundation. In any event, none of them would support the claim that RCA participated in the alleged conspiracy.

Appellants also attack the court's pretrial order delineating the issues and separating the issue of liability from that of damages and the taxation of costs. The pretrial order was in all respects proper and, in any event, could not have prejudiced appellants. Likewise, there is no error in the trial court's orders taxing costs in favor of RCA.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT "THERE IS NO EVIDENCE THAT RCA CONSPIRED WITH ANYONE."

RCA does not belong in this action for the simple reason that it did not sell to retailers in Northern California (Tr. 4545-4546). It sold f.o.b. point of shipment to an independent distributor, Meyer (Exh. 88; Tr. 1333, 4546). RCA did not deal with appellants but neither did it deal with appellants' competitors. It was not a participant in the market within which appellants operated.

As the trial court pointed out:

> "There has been no evidence to support plaintiffs' theory that Meyer was RCA's agent in selling RCA brand television sets to retailers" (R. 1923).
>
> * * * * * * *
>
> "* * * The record is devoid of any evidence of an agreement between RCA and anyone to combine or conspire in the manner charged or in any other manner. Nor is there any evidence from which a jury could reasonably infer the existence of such an agreement or combination" (R. 1925).
>
> * * * * * * *
>
> "* * * there is no evidence that San Francisco retailers were required by RCA to adhere to RCA's suggested prices, or that they did so" (R. 1928).

Accordingly, the trial court determined that

> "Plaintiffs have failed to make a case against RCA. There is no evidence from which a jury could reasonably or fairly infer that RCA participated in or had knowledge of a conspiracy" (R. 1928).

A. RCA did not sell television sets to retailers in Northern California.

Appellants' attack upon the lower court's decision seems to be based primarily upon RCA's refusal to sell television sets directly to appellants (App.Opn.Br., pp. 97-101, 123-127). However, as the lower court pointed out, "RCA was simply not engaged in the business of selling to retailers in San Francisco, where the alleged conspiracy is charged to have taken place" (R. 1925).

RCA sold only to distributors in Northern California, and the court below correctly stated:

> "A preference for dealing with past customers does not raise an inference of conspiracy. *Independent Iron Works, Inc. v. United States Steel Corp., supra; Windsor Theatre Co. v. Walbrook Amusement Co.,* 189 F.2d 789, 798-799 (4 Cir. 1951); *G & P Amusement Co. v. Regent Theatre Co.,* 107 F.Supp. 453, 459 (N.D.Ohio 1952), aff'd per curiam, 216 F.2d 749 (6 Cir. 1954), certiorari denied 349 U.S. 904 (1955).
>
> "Those cases apply with even greater force to the case at bar, where plaintiffs requested a complete change in RCA's long established selling policy in existence for many years before plaintiffs commenced business in 1957" (R. 1926).

Appellants erroneously assert that *Standard Oil Company of California v. Moore* (9 Cir. 1957) 251 F.2d 188 held that such "independent business reasons" for refusing to deal with a retailer are not sufficient to justify taking the case from the jury (App.Opn.Br., p. 97). In that case, appellant oil companies, *all of whom sold to dealers in the market area,* claimed that each of *their refusals to*

sell to a particular dealer was the result of an independent business decision. This Court held that there was sufficient evidence of concert of action (251 F.2d 205-207) to allow a jury to reject appellants' claims and infer a conspiracy by the companies to "control price cutting and curb-sign advertising by refusing gasoline to dealers whose severe price cutting and persistent curb-sign advertising bring them into controversy with their present suppliers" (251 F.2d 205). There is no such evidence or inference applicable to RCA in the case at bar. On the contrary, RCA merely adhered to its established policy not to sell to *any* retailers in Northern California (Tr. 4545-4546).

Appellants' apparent theory is that anybody who did not sell to them engaged in parallel action and, therefore, conspired against them.[5] However, RCA's actions in not selling to appellants were not parallel with the other defendants.[6] Furthermore, parallel action without evidence of some concert of action will not allow an inference of conspiracy *(Theatre Enterprises v. Paramount* (1954) 346 U.S. 537, 541).

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[5]This theory perhaps explains why, when appellants commenced suit in August, 1960, they charged that RCA had conspired to refuse to sell to them since 1957. RCA had not even received a request to sell to appellants when the suit was filed (supra, p. 5, ftn. 4). Even appellants do not claim any request was made prior to July, 1960.

[6]The lower court pointed out:

> "Moreover, there is no evidence that RCA engaged in parallel action. Of the defendants, other than the retailer Hale, two distributors (Maytag West Coast and California Electric Supply Company) sold to plaintiffs (Maytag: January 1958 to March 1959); California Electric: May 1957 to September 1958), two manufacturer-distributors never sold to plaintiffs, although requested to do so from 1960 onwards (Frigidaire and GE), and three manufacturers (Borg-Warner, Whirlpool and RCA) never sold directly to retailers in Northern California" (R. 1926).

As this Court held in affirming a directed verdict in *Independent Iron Works, Inc. v. United States Steel Corp.* (9 Cir. 1963) 322 F.2d 656, certiorari denied (1963) 375 U.S. 922,

> "The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. * * * Like businesses are generally conducted alike and, as the trial judge correctly stated, *similarity in operations lacks probative significance unless present 'under circumstances which logically suggest joint agreement, as distinguished from individual action'* " (322 F.2d 661; emphasis added).

In *Brown v. Western Massachusetts Theatres, Inc.* (1 Cir. 1961) 288 F.2d 302, the court affirmed a directed verdict for defendant at the close of plaintiff's case and pointed out:

> "Whatever this term [conscious parallelism] means, it must be something more than mutual awareness of similar conduct. This awareness must be an element entering into each party's decisional process, and the basis for inferring that it did so must be something more substantial than a guess. For everyone to run out of the building when there is a cry of 'Fire,' or to stand in a queue at a bus stop, is not conscious parallelism" (288 F.2d 305-306).

To the same effect see *United States v. Standard Oil Company* (7 Cir. 1963) 316 F.2d 884, 890 and *Winchester Theatre Co. v. Paramount Film Distributing Corp.* (1 Cir. 1963) 324 F.2d 652, 653.

Girardi v. Gates Rubber Company Sales Division, Inc. (9 Cir. 1963) 325 F.2d 196 does not support appellants' claim that parallel action, by itself, is sufficient evidence to allow a jury to infer a conspiracy. In that case a conspiracy between a manufacturer and a distributor to eliminate a price-cutting distributor was alleged. The Court held that there was sufficient evidence of complaints by the defendant distributor to the manufacturer concerning the trade practices of the plaintiff distributor to infer concert of action in the subsequent cessation of supply to the plaintiff distributor.

Appellants have not produced any evidence showing concert of action by RCA. RCA's policy of selling to distributors, and not to retailers in Northern California, is not only different from the acts of those defendants who did sell to retailers and not to appellants, but is not a circumstance which "logically suggest[s] joint agreement" to conspire against one particular retailer. On the contrary, it shows that RCA was not even a potential conspirator against appellants and that no jury could reasonably infer that RCA participated in any conspiracy to boycott appellants.

B. RCA was unconcerned with the prices charged by retailers.

There is likewise no basis for the assertion that the furnishing of suggested retail prices by RCA to Meyer constituted evidence of participation in a conspiracy.

The prices suggested by RCA were quite different from the prices suggested by Meyer (Tr. 1242-1245; Exhs. 1947, 1948, 5114, 5116; and see supra, p. 5, ftn. 3).

Furthermore, even retailer adherence to a manufacturer's suggested prices would not be sufficient evidence of a conspiracy to violate the antitrust laws *(Klein v. American Luggage Works, Inc.* (3 Cir. 1963) 323 F.2d 787, 791). In the *Klein* case, which appellants do not even attempt to distinguish, the Third Circuit held that "advising" retail prices by a manufacturer was not conspiratorial conduct (323 F.2d 791). It, therefore, reversed a district court finding of a conspiracy to refuse to sell. It is even clearer here that RCA has in no way conspired for, as the court below pointed out,

> "It is clear that these [suggested retail prices] were given as suggested guide lines, were not mandatory on the distributors, and that such suggested retail prices as were given to the retailers all came from the distributors and not from the manufacturers" (R. 1921).

Nor is there evidence to support the assertion that cooperative advertising funds were used by RCA to support list prices (App.Opn.Br., p. 123). As appellants point out, local newspapers charge national firms much higher advertising rates than they do local retailers (App.Opn. Br., p. 30), and manufacturers make funds available for local advertisement of the national product. The record shows that Meyer received cooperative advertising funds from RCA based upon the amount of Meyer's purchases and RCA thereafter exercised no control, other than trademark protection (Exh. 99, Tr. 1230, 1334, 4592). The trademark protection consisted of review by an independent advertising agency of claims for cooperative advertising funds to insure proper use of RCA's trademarks

(Exh. 99, pp. 10-13, 28-30).[7] There was no RCA policy to have advertisements reflect suggested prices (Tr. 4543), and RCA was not concerned if advertisements showed less than suggested prices (Tr. 4606).

In connection with their assertions about advertising, appellants attempt to convey the erroneous impression that the lower court excluded an exhibit which appellants assert showed that RCA required retailers, as a condition to receiving cooperative advertising funds, to make affidavits that they advertised at list prices (App.Opn.Br., p. 74; Appx. A, p. xxii), and that they did not engage in comparative price advertising (App.Opn.Br., p. 108). The excluded letter from RCA concerned misrepresentation in comparative price advertising (Exh. for Ident. 5068). It stemmed from RCA's desire to conform to the policies of the Federal Trade Commission (Exh. for Ident. 5068D).[8]

The Federal Trade Commission Guides Against Deceptive Pricing in effect at that time stated that, where retailers use comparative price advertising, no statement

[7]RCA is necessarily concerned with any improper use of its trademarks which could affect RCA's rights (see, e.g., *King-Seeley Thermos Co. v. Aladdin Industries, Inc.* (2 Cir. 1963) 231 F.2d 577, 578-580; *Bayer Co. v. United Drug Co.* (S.D.N.Y. 1921) 272 Fed. 505, 512; 3 Callman, Unfair Competition and Trademarks (2d Ed. 1950) pp. 1338-1340). RCA, therefore, insists on the proper use by distributors and retailers of RCA trademarks in conjunction with the sale and advertisement of products manufactured by RCA (Exh. 88, p. 6; Exh. 99, pp. 10-13). This is in accord with the established practice of manufacturers to avoid damage to their trademarks (see Bayol, *Policing of Trademarks,* United States Trademark Ass'n, Trademark Management (2d Ed. 1956), pp. 67-88; Derenberg, *The Problem of Trademark Dilution and the Antidilution Statutes* (1956) 44 Cal.L.Rev. 439, 463-475).

[8]It is irrelevant that a trade association, the EIA, published an advertising booklet based upon these F.T.C. guides (Exh. for Ident. 7; see App.Opn.Br., p. 74). RCA did not belong to NEMA or AHLMA (R. 751-752, 935), mentioned throughout appellants' brief.

representing a saving or reduction in price should be used unless the saving or reduction was from the usual or customary selling price in the trade area or from the advertiser's usual or customary retail price in the regular course of business (23 Federal Register (1958) 7965-7966).

RCA's letter (Exh. for Ident. 5068) stated that, since verification of all comparisons in cooperative advertising could not be made, claims for advertisements containing comparative advertising would not be honored unless accompanied by an affidavit stating that the compared price was a price at which the advertiser actually sold the article in the regular course of business or that the compared price was the usual retail selling price in a specified trade area. The required affidavit made no mention of list or suggested prices or the actual selling price. It dealt only with the compared price. After the Federal Trade Commission changed its Guides Against Deceptive Pricing (29 Federal Register (1964) 178), RCA discontinued the affidavit requirement (Exh. for Ident. 5068D).

C. Meyer was not an agent of RCA; it was an independent distributor of products manufactured by RCA.

RCA did not participate in any conspiracy through the acts of the distributor, Meyer. Meyer was a separate defendant in this action and has settled with appellants. We do not mean to suggest that Meyer violated the antitrust laws. We point out only that appellants' attempt to hold RCA responsible for the acts of Meyer finds no support in the record and is contrary to law.

Meyer was not the agent of RCA. RCA merely sold television sets to Meyer with full title passing to Meyer (Exh. 88, p. 5; Tr. 1333).

In *Mathews Conveyor Co. v. Palmer-Bee Co.* (6 Cir. 1943) 135 F.2d 73, the Court affirmed dismissal of an action for an accounting on the ground that the defendant, an exclusive distributor for plaintiff, could not be deemed an agent of plaintiff. The Court held:

> "* * * the word 'agency' is frequently used to indicate that a dealer has the exclusive right to sell a specified article in certain territory; *but such dealer does not thereby represent the manufacturer as agent in the sense in which that relation is understood in the law of principal and agent,* but simply buys from the manufacturer in the regular course of trade and sells the article to the public. Such a transaction is a sale rather than an agency" (135 F.2d 77-78; emphasis added).

In *Standard Fashion Co. v. Magrane Houston Co.* (1 Cir. 1919) 259 Fed. 793, affirmed (1922) 258 U.S. 346, a case involving section 3 of the Clayton Act, the Circuit Court held that defendant, the distributor, was not an agent of plaintiff, the manufacturer, because

> "Full title passed from the plaintiff to the defendant. The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers" (259 Fed. 794).

In the words of the District Court in *C.B.S. Business Equipment Corp. v. Underwood Corporation* (S.D.N.Y. 1964) 240 F.Supp. 413, 422, "What is determinative is whether" the distributor "is entitled or enabled to act toward the goods as the real owner."

D. RCA did not give special or favored treatment to appellants' competitors.

Appellants' assertions that certain retailers, particularly Broadway-Hale, received special treatment from RCA are groundless. For example, there is no support for appellants' references to alleged "special meetings" between Hale and RCA to assist Hale in maintaining a 30 to 40 per cent price margin (App.Opn.Br., pp. 100, 113, 125). The portions of the record upon which appellants rely (Tr. 188-210, 222-224, 231-275; Exhs. 349, 350) show that an incidental part of a trip to New York by some representatives of Hale was to "see what the Whirlpool line looked like" (Tr. 256). At the time of that buying trip (Tr. 563), the Hale representatives mistakenly believed that Whirlpool was a part of RCA (Tr. 258-259).[9] They spoke with a representative of RCA, who made it clear that RCA and Whirlpool were separate corporations (Tr. 573-575).

Appellants' assertion that RCA gave Hale special treatment in the use of cooperative advertising funds (App. Opn.Br., pp. 31, 39, 100) is a further example of the distortion by which appellants attempt to make a case against RCA. Appellants state: "* * * R.C.A. supplied *additional* advertising funds for *particular* promotions (Tr. 4765-4766, 4792, 4797). Hale received a special authorization, No. 1001, in the amount of $2,325.00, relating to R.C.A. Victor (Pl. Ex. No. 575)" (App.Opn.Br., p. 39; emphasis by appellants). But appellants fail to point out that such additional advertising funds were merely a type of cooperative advertising funds (Tr. 4558-

[9]RCA licensed the use of its trademark on some of the products manufactured by Whirlpool (Exh. 12155).

4560; Exh. 99, p. 3) administered by the distributor, Meyer. Exhibit for Identification 575 is a Meyer form signed by a Meyer salesman concerning three months of advertising. There is no showing that it was "special" to Hale or that it was submitted to RCA.

There is likewise no evidence to support appellants' groundless implications that RCA had "key market" advertising funds or funds earmarked for a specific retail account (App.Opn.Br., p. 31). The fact that Hale made use of *cooperative* advertising funds furnished to Hale by Meyer (Exh. No. 1846) does not show any special treatment by RCA. RCA contributed to Meyer's cooperative advertising funds with the understanding that Meyer would treat all of Meyer's retail customers on a proportionately equal basis (Exh. 99, p. 2). There is no showing that Hale received a disproportionate share from Meyer. In any event, the fact that those funds were used by *Meyer* for local advertising in cooperation with retailers, including Hale, does not support an inference that Hale received any special treatment from RCA.

II

THERE WAS NO ERROR IN THE DISTRICT COURT'S PRETRIAL DISCOVERY ORDERS PERTAINING TO RCA.

Pretrial discovery orders are a matter of judicial discretion and will not be overturned unless that discretion is abused.

> "An appellate court does not * * * decide whether it would, in the first instance, have permitted the discovery prayed for.

"Granting or denying a request under rule 34 is a matter within the trial court's discretion and it will be reversed only if the action taken was improvident and affected substantial rights" *(Tiedman v. American Pigment Corporation* (4 Cir. 1958) 253 F.2d 803, 808).

Francisco v. Travelers Insurance Company (8 Cir. 1966) 363 F.2d 1019, 1021;

Jayson v. United States (5 Cir. 1961) 294 F.2d 808, 811.

A. The District Court did not err in its rulings on appellants' motions for the production of documents concerning RCA.

Appellants erroneously argue that the District Court's discovery rulings denied them access to documents to which they were entitled (App.Opn.Br., pp. 172-177; Appx. A, pp. 1xii-1xiii). In each of the instances of which appellants complain of rulings involving RCA, the lower court granted the requested discovery, or appellants failed to establish either the existence of the requested documents or the good cause[10] or relevancy necessary for their production.

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[10]The Supreme Court has recently discussed the good cause requirement:

"This additional requirement of 'good cause' was reviewed by Chief Judge Sobeloff in *Guilford National Bank v. Southern R. Co.*, 297 F.2d 921, 924 (C.A. 4th Cir.), in the following words:

* * * * *

"'* * * [T]he court must decide as an initial matter, and in every case, whether the motion requesting production of documents or the making of a physical or mental examination adequately demonstrates good cause. The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26(b). Thus, by adding the words

An example of appellants' attempted distortion is their claim (App.Opn.Br., pp. 172-173; Appx. A, p. lxii) that a motion for an order to show cause why documents should not be produced (R. 323) was improperly denied (R. 413-415). Appellants attempt to convey the erroneous impression that the trial court in it rulings 2(e) and 2(j) (R. 414) improperly "qualified the documents" RCA was to produce (App.Opn.Br., p. 172). Ruling 2(e) granted appellants' requests (R. 324, lines 23-28), except with respect to correspondence which did not exist (R. 379). Likewise, ruling 2(j) denied without prejudice a request (R. 325, lines 18-22) by appellants for RCA reports pertaining to conferences with representatives of any defendant until such time as appellants could develop in depositions a "legal basis for the existence of such conferences to justify the request" (Rep. Tr. of Hearings on Motions for Order to Show Cause Why Documents Should Not be Produced, Apr. 17, 1964, p. 69; R. 414). Appellants have never shown that any of such conferences or documents existed.

Appellants, on June 5, 1964, filed another motion, this time against all "factory defendants" (R. 422) seeking

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". . . good cause . . . ," the Rules indicate that there must be greater showing of need under Rules 34 and 35 than under the other discovery rules.'

"The courts of appeals in other cases have also recognized that Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule. This is obviously true as to the 'in controversy' and 'good cause' requirements of Rule 35. They are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination" (*Schlagenhauf v. Holder* (1964) 379 U.S. 104, 117-118).

production of "[a]ll intra-office reports, memoranda or notes pertaining to or relating to the plaintiffs above named or the retail defendants above named during the above period of time" (R. 425, lines 7-9). In its response (R. 489) RCA pointed out that it "is still searching its files for any documents responsive to this item and has no objection to its being granted" (R. 492, lines 4-6). Furthermore, when appellants subsequently filed an interrogatory asking whether or not statements or reports reflecting conversations having to do with the acquisition, sale or advertising of television sets by appellants or other retail defendants existed (R. 625-626), RCA answered that

> "There are no such statements or reports other than confidential communications to and from the defendants' attorneys made after commencement of the action * * *" (R. 646).

The misleading nature of appellants' argument is further shown by the claim (App.Opn.Br., p. 175; Appx. A, p. lxiii) that the court below erred in denying certain requests in another of appellants' motions for production of documents filed November 20, 1964 (R. 745).

Appellants claim they were injured by denial of item 20 of the November 20th motion requesting letters received by defendants from plaintiffs and all intraoffice communications concerning such letters. The court only denied production of the original letters and it denied them only because appellants already had copies (Rep. Tr. of Hearings on Motions, Dec. 30-31, 1964, pp. 234, 174-175, 110). It granted appellants' motion for production of all the intraoffice memoranda concerning the let-

ters and anything written on the original letters (R. 129, 996).

Items 22(c), (d) and (e) of the November 20th motion requested all letters from any officer, agent or representative of RCA to or from Meyer concerning (c) preventing the plaintiffs from acquiring or obtaining RCA television sets from other sources, (d) conversations or statements made by retail dealers concerning prices, other retailers, competition, advertising or promotion of television sets in San Francisco, and (e) sales or possibility of sale to certain specified discount stores (R. 750). RCA objected because appellants again had not shown that any such documents existed (R. 931) and the court denied the motion to produce those items (R. 129, 996; Rep.Tr. of Hearing on Motions, Dec. 31, 1964, p. 234). Appellants have never shown the existence of any such documents.

Item 27(f) of the November 20th motion requested:

> "All letters or notes of minutes found in the files of any of your officers, agents or representatives who attended associations composed of two or more manufacturers of household appliances or television sets during the period 1957 to 1964 pertaining to the following, NEMA, EIA, GAMA and AHLMA [with respect to]
>
> * * * * * * *
>
> "(f) Discount Department Stores or Mass Merchandising Stores" (R. 751-752).

RCA pointed out that it did not belong to NEMA, GAMA, or AHLMA and that no good cause had been shown for requiring RCA to undertake such a search (R. 935). The request was denied (R. 129, 996; Rep. Tr. of Hearing on

Motions, Dec. 31, 1964, p. 236) and appellants still have not established good cause.

B. The District Court did not err in sustaining RCA's objections to certain interrogatories.

Appellants' claim (App.Opn.Br., pp. 174, 176; Appx. A, p. lxiii) that the District Court erred in sustaining certain RCA objections to appellants' interrogatories is also unfounded.

Items 1 and 2 of appellants' interrogatories filed December 7, 1964 (R. 790) asked whether documents existed which reflected conversations in which Manfree and USE were mentioned "expressly or *by implication*" (R. 791-792; emphasis added). The District Court sustained RCA's objection (R. 826, lines 15-23) to the vague portion of the interrogatory which referred to conversations in which USE or Manfree were mentioned "by implication" (R. 972).

Item 3 asked whether documents existed which reflected conversations between defendants and *attorneys* in which Manfree was mentioned (R. 792). The court sustained RCA's objection (R. 826-827) that the interrogatory called for either confidential communications between attorney and client or work product, and that good cause was not shown (R. 972).

Item 6 requested the listing of the documents referred to in items 1 through 5, and the court did not require answers to the extent that it had sustained objections to items 1 through 5 (R. 972).

Appellants' claim (App.Opn.Br., p. 174; Appx. A, p. lxiii) that the court committed prejudicial error in re-

fusing to require (R. 671) defendants to answer appellants' written interrogatories filed September 29, 1964 (R. 625) has no application to RCA. RCA had previously answered those interrogatories, stating that there were no such statements or reports other than confidential communications to and from defendant's attorneys made after commencement of the action (R. 646).

III

THE DISTRICT COURT'S EVIDENTIARY RULINGS CONCERNING RCA WERE CORRECT. THE EXCLUDED TESTIMONY AND EXHIBITS DID NOT, IN ANY EVENT, SHOW THAT RCA PARTICIPATED IN A CONSPIRACY.

In their brief (see particularly App.Opn.Br., pp. 146-151) and in their specification of errors (see particularly App.Opn.Br., Appx. A, pp. xx-xxviii), appellants attack virtually every ruling of the trial court which excluded hearsay or other improper evidence which appellants assert might have connected RCA to the alleged conspiracy.[11] For the most part, appellants have ignored the actual reason for exclusion and have laboriously argued

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[11]For example, appellants' attack the rejection of Exhibit for Identification 1691 (App.Opn.Br., Appx. A, pp. xxii-xxiii), a copy of a letter from the president of appellants to RCA dated July 13, 1960, requesting the right to buy RCA products. There was no showing that the letter was ever mailed (Tr. 5984). In any event, RCA never received it (Tr. 4561, 4710). It was thus properly excluded (Tr. 6116) for lack of a proper foundation (*Wagner Tractor, Inc. v. Shields* (8 Cir. July 11, 1967) 381 F.2d 441, 446). A request to sell which was never received can hardly fit appellants' description as "evidence that R.C.A. had directly refused to sell its television sets to appellant Manfree" (App.Opn.Br., Appx. A, pp. xxii-xxiii).

the asserted relevancy of the excluded exhibits or testimony. And in so doing, appellants have resorted to a distorted or misleading characterization of the excluded material.[12] To reply in detail to each of those characterizations would unnecessarily expand this brief, and we shall, therefore, devote most of this portion of the brief to supporting the lower court's rulings on the grounds upon which they were made. By failing to reply in detail, however, to appellants' inaccurate characterizations of the excluded material, we do not acquiesce in appellants' mistaken assertions that the exhibits or testimony would have been relevant or material if they had constituted proper evidence.

Nor do we attempt to deal with all the exhibits which appellants claim were improperly excluded. We deal only with exhibits which appellants assert show conspiratorial conduct by RCA. We do not mean to suggest that the other exhibits indicate conspiratorial conduct by anyone. But even if it be assumed that they did, they do not support

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[12]For example, appellants characterize Exhibits for Identification 1165-1169 as indicating that "requests for special promotional allowances for co-conspirator Hale were forwarded to R.C.A. by the distributor and honored by R.C.A., concerning certain in-store promotional expenditures by Hale, stating that the allowance should be made after an 'agreement' had been reached between representatives of Hale and Meyer" (App.Opn.Br., Appx. A, p. xxv).

These exhibits were rejected as hearsay and without foundation (Tr. 4954, 4956, 4959) and appellants make no claim to the contrary. The exhibits consist of Meyer and Hale credit memos between each other. Most of them do not even show that RCA merchandise was involved. None show that the exhibits were forwarded to RCA, that RCA honored the exhibits, or that an allowance would be made after an agreement between representatives of Hale and Meyer.

appellants' assertion that RCA was a party to such conduct.[13]

A. The District Court properly excluded those exhibits which appellants erroneously assert would have shown that RCA enforced its suggested prices upon the distributor.

The exclusions of which appellants complain in this regard (App.Opn.Br., pp. 146-149) were not only proper but the excluded exhibits do not show control by RCA over Meyer, or any "agreement" with Meyer, the independent distributor of television sets manufactured by RCA.

Appellants apparently contend (App.Opn.Br., pp. 146-147) that RCA waived a proper foundation for Exhibit for Identification 343, an RCA intra-company memorandum dated August, 1957 (discussing a suggestion by Meyer that some of RCA's suggested list prices be raised[14]), and Exhibit for Identification 344, an RCA intra-company memorandum dated September, 1958 (attaching a distributor's wholesale price list—not a retail price list—for

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[13]For example, RCA was not a member of NEMA or AHLMA (R. 751-752, 935). Therefore appellants' assertions that the court improperly excluded exhibits regarding these trade associations (App.Opn.Br., pp. 164-165; Appx. A, pp. li-lvi; Appx. B) are not applicable to RCA.

[14]Appellants' assertion (App.Opn.Br., Appx. A, p. xxi) that 343 has a "price list attached, containing pencil notations as to the changes in suggested list prices" is inaccurate. The price list attached was not even an RCA price list. It was a G.E. price list to which had been added some comparative notations in pencil labeled RCA Zone II (RCA's reference to the West Coast). Appellants' claim that 343 refers to discount stores as a "cut price operation" (App.Opn.Br., p. 147) is misleading. The actual language of the RCA memorandum is "I don't see how it [raising suggested list prices] can hurt us in retail establishments that cut prices, such as discount houses, etc., because they will only show a larger price cut" (Exh. for Ident., 343).

a clearance sale). In response to appellants' listing of documents (R. 1533), RCA objected

> "* * * to the admission of any such price sheets or correspondence other than price sheets published by RCA or *correspondence emanating from RCA* on the ground that such other price sheets and correspondence is hearsay as to RCA and on the grounds of lack of foundation for its admission" (R. 1518; emphasis added).

Even if it be assumed that this statement might be construed as an admission of authenticity as to the documents not objected to (see App.Opn.Br., p. 147), the statement does not apply to Exhibits for Identification 343 and 344. These exhibits are not correspondence from RCA as appellants apparently assert (App.Opn.Br., p. 147), but are RCA intra-company memoranda, as appellants elsewhere admit (App.Opn.Br., Appx. A, p. xxi).

The exhibits are also irrelevant (see Tr. 4717, 6501-6503). A suggestion by a distributor that the manufacturer raise its suggested retail prices does not support an assertion that the manufacturer enforced its retail prices upon anyone. Moreover, the record shows that Meyer had its own suggested retail prices and that they did not correspond with the suggested prices of RCA (supra, pp. 5, ftn. 3, and 12).

In this regard, appellants also erroneously claim that the trial court improperly excluded Exhibit for Identification 348, a 1958 letter from an officer of Meyer addressed to an officer of RCA concerning RCA's national advertising of television sets at Zone I (Eastern) prices (App.Opn.Br., p. 148; Appx. A, p. xxi). But this exhibit

was hearsay and without proper foundation (Tr. 4604). The writer of the letter was not identified or available for cross-examination, nor was the recipient called to testify (Tr. 4603-4604). The most that this letter would show is that RCA knew that Meyer disapproved of the national advertising of RCA's Eastern (Zone I) suggested retail prices which were lower than Western (Zone II) suggested prices (Tr. 4540-4541). It does not show that RCA knew of, let alone participated in, any policy by Meyer against price cutting or that RCA took any action regarding the request.

Nor do Exhibits for Identification 5060, 5061 or 5070 (correspondence from RCA to distributors) show that RCA enforced its list prices upon its distributor (see App.Opn.Br., p. 148; Appx. A, p. xxii). Appellants seem to speculate from these exhibits that:

(1) A company contributing funds for local retail advertising of the manufacturer's product is seeking to control the type of advertising done locally (App. Opn.Br., pp. 148-149);

(2) A company seeking to control the type of advertising done locally can also participate in establishing "a local fixed retail market under which its suggested retail list prices are followed and maintained" (App.Opn.Br., pp. 148-149); and

(3) Participation in such a market entails joining with other manufacturers and distributors to boycott retailers advertising below suggested list prices.

These are mere speculations, not reasonable inferences from the excluded exhibits. As shown before, the advertising procedures of RCA have nothing to do with main-

taining or fixing retail prices or the alleged boycott of appellants (supra, pp. 12-15, 17-18). Moreover, appellants' speculation is based not on what these exhibits show, but upon appellants' highly inaccurate characterization of them. For example, appellants erroneously state "Ex. No. 5060 consists of a written instruction from R.C.A. to all of its distributors dated February 2, 1959, requiring them to base their advertising allowances to retailers upon list prices; and discontinuing the requirement that the distributors had to match the factory's funds for dealer advertising" (App.Opn.Br., Appx. A, p. xxii). There is no mention in the exhibit of requiring advertising allowances to dealers to be based on list prices. The exhibit only reflects a change in billing procedure (see Tr. 4554-4555).[15]

Likewise, Exhibit for Identification 5061 does not list local dealers to benefit by an RCA advertisement as appellants apparently would have this Court believe (App.Opn.Br., Appx. A, p. xxii), but requests the distributor to list the names of RCA dealers who wish to be placed in an RCA promotional advertisement.

And, contrary to appellants' assertion (App.Opn.Br., Appx. A, p. xxii), Exhibit for Identification 5070 does not indicate that there was any requirement of prior RCA approval for the payment by distributors of advertising money to retailers.[16]

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[15]The exhibit stated that because of recent Internal Revenue Service regulations, RCA would discontinue billing distributors for their share of cooperative advertising funds, and would instead give distributors credit for their share.

[16]Exhibit for Identification 5070, which consists of four letters, was offered by appellants in connection with an inquiry concerning RCA approval of distributors' promotional activities involving dealer prizes, and was properly excluded as irrelevant (Tr. 4812-4813).

Appellants claim that Exhibit for Identification 5068 is of "special importance" (App.Opn.Br., p. 148) on the erroneous theory that it required dealers participating in cooperative advertising funds to verify "what prices they were showing on their RCA product advertising" (App. Opn.Br., Appx. A, p. xxii). As shown before (supra, pp. 14-15), the retailer was only required to show that he had not violated the Federal Trade Commission guides with respect to comparative price advertisements in effect at that time.[17]

There is no basis for the appellants' assertions that the court erred in excluding appellants' tabulations (Exh. for Ident. 5064) allegedly showing that Meyer followed RCA's list prices (App.Opn.Br., p. 166; Appx. A, p. lvi). Appellants withdrew the offer of that exhibit (Tr. 6590) after RCA objected that the exhibit was cumulative (Tr. 6589).

B. The District Court properly excluded those exhibits and testimony which appellants erroneously assert would have shown that RCA maintained a territorial distribution system.

Appellants' objection to the exclusion (Tr. 4415; 4489-4490) of deposition testimony by Mr. A. H. Meyer concerning RCA Victor Distributing Corporation of Los Angeles, a subsidiary of RCA which distributed television sets to retailers in Southern California (Meyer Dep., p.

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[17]Appellants' further claim (App.Opn.Br., p. 148) that Exhibit 5068 "bears on" deposition testimony of Mr. Saxon that RCA did not engage in retail price competition is curious. That portion of Mr. Saxon's deposition testimony was excluded because the questions advanced during that portion of his deposition were unintelligible and the witness was confused (Tr. 4522-4523). Moreover, Exhibit 5068 has nothing to do with retail price competition, but deals only with deceptive comparative price advertising.

10, lines 15-22; pp. 15-17), is based upon the unfounded assertion that the testimony would have supported a claim that the maintenance of territorial agreements was part of an alleged conspiracy to boycott appellants (App.Opn.Br., pp. 149, 163; Appx. A, pp. xxiii-xxiv). Appellants seek to support these assertions with a misleading characterization of Mr. Meyer's excluded testimony (App.Opn.Br., Appx. A, pp. xxiii-xxiv). Mr. Meyer did not testify that the RCA subsidiary had "exclusive distribution rights in the counties south of the Tehachapis; or Southern California" (App.Opn.Br., Appx. A, p. xxiv). He testified as follows:

> "Mr. Keith: Q. Now who took over the distribution of the R.C.A. products in the Los Angeles area, Mr. Meyer, do you know?
>
> "A. The R.C.A. Victor Distributing Company which is a wholly owned subsidiary of the Radio Corporation.
>
> "Q. Now, could you tell us what the territory would be, the Los Angeles territory?
>
> "A. It was the five counties south of the Tehachapis. I think it's five. Southern California" (Meyer Dep., p. 10, lines 15-22).

Appellants' counsel waived (Tr. 4489) reading the remainder of the testimony concerning RCA Victor Distributing Corporation of Los Angeles (Meyer Dep., pp. 15-17) which appellants now claim was improperly excluded (App.Opn.Br., Appx. A, pp. xxiii-xxiv). This testimony was that Mr. Meyer objected to RCA Victor Distributing Corporation's selling to people who had headquarters in Los Angeles but retailed in the northern part of the State. It does not support appellants'

claim "that Meyer and R.C.A.-Victor Distributing Corporation of Los Angeles agreed to a territorial division for R.C.A. product distribution in California; and that the latter refused to sell television sets to Manfree in respecting this exclusive territorial arrangement" (App.Opn.Br., Appx. A, p. xxiii).

Exhibit for Identification 1702 is a statement of business policy by RCA Victor Distributing Corporation in response to appellants' charge of discrimination in favor of White Front discount stores. The letter states:

> "The Los Angeles Branch of the RCA Victor Distributing Corp. does not sell household appliances or television sets to the White Front Stores in Oakland or San Jose, California. We concentrate our sales efforts in the market areas where we are best facilitated to serve which are in Southern California. We do not understand how we could possibly discriminate against your organization in any way since we have no customers in your market area."

There is no basis for appellants' assertion that this is a refusal to sell to appellants "allegedly based on territorial distribution agreements" (App.Opn.Br., p. 163). There is no showing that RCA Victor Distributing Corporation consulted with Meyer about this request or that the letter is anything other than a statement of business judgment by RCA Victor Distributing Corporation of Los Angeles to concentrate its sales of television sets in Southern California.

The cases cited by appellants in this regard (App.Opn. Br., p. 163) do not apply to this situation. *U. S. v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365 and *White Motor*

Co. v. United States (1963) 372 U.S. 253 deal with the question of whether territorial restraints imposed upon distributors by the manufacturer are violative of the anti-trust laws. There is no showing of any restraints, imposed by the manufacturer or otherwise, in this case. And *Girardi v. Gates Rubber Company Sales Division, Inc.* (9 Cir. 1963) 325 F.2d 196 and *Walker Distributing Co. v. Lucky Lager Brewing Co.* (9 Cir. 1963) 323 F.2d 1 deal with concerted action among a manufacturer and distributors to eliminate a specific distributor, not territorial agreements.

C. The District Court properly excluded those exhibits which appellants erroneously assert would have shown that RCA had direct knowledge and contact with certain "favored" retailers.

Contrary to appellants' assertions (App.Opn.Br., pp. 149, 159), Exhibits for Identification 780 and 1159, concerning cooperative advertising claims, were properly excluded as irrelevant (Tr. 4649-4650). Exhibit No. 780 is a letter from Meyer, addressed to RCA, noting that some claims for cooperative advertising funds had been rejected by the independent checking agency because the advertisements violated Federal Trade Commission rulings regarding the number of square inches of viewable picture. The letter requested that claims be honored and stated:

> "We have made personal calls on both of these offending accounts stressing the necessity of their adhering to those rulings set forth by the Federal Trade Commission insofar as listing the number of viewable surface inches of picture tubes whenever the designation '21 inch' is used. We have also gone over the bulletin we sent to the trade on Sept. 16 regarding this ruling."

Exhibit for Identification 1159 is the RCA response noting that, because of the remedial action which had been taken, the credit claims would be approved. The most that these exhibits show is that Meyer, a distributor selling directly to retailers, supported their claims for cooperative advertising funds and that RCA's interest was in maintaining compliance with FTC rulings. The exhibits do not show that such treatment was limited to any particular RCA retailers.[18]

Exhibits for Identification 363, 364 and 365 consist of correspondence from persons other than RCA requesting that RCA's service division (which repairs television sets manufactured by RCA) retain its membership in the San Francisco Better Business Bureau. They were properly excluded as hearsay and irrelevant (Tr. 4747). The most that these exhibits would show is the service division's natural interest in the problems of fraudulent practices of others who repair television sets. The exhibits have no bearing on an alleged conspiracy to boycott appellants and do not, as appellants claim (App.Opn.Br., p. 149), show any RCA concern with local retail market conditions.

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[18]Exhibits for Identification Nos. 1165-1169 (discussed supra, p. 25, ftn. 12) are also relied upon by appellants to show special treatment by RCA to Hale (App.Opn.Br., p. 159). These exhibits not only fail to show such special treatment, but were hearsay and without foundation (Tr. 4954, 4956, 4959) and appellants make no claim to the contrary.

D. The District Court properly excluded those exhibits and testimony involving a mail order firm's advertisement which appellants erroneously assert would have shown a plan by RCA to boycott persons who advertised at less than suggested prices.

Appellants complain (App.Opn.Br., pp. 149-151) of the exclusion of deposition testimony (Meyer Dep., pp. 20-23, pp. 24-25; p. 26, lines 14-15; pp. 27-30; p. 31, lines 2-17; p. 32, line 4, to p. 33, line 23; Maag Dep., pp. 89-91, 92, 93-95) pertaining to Exhibit for Identification 784. The exhibit is a July 19, 1958 letter from an employee of Meyer forwarding to RCA a copy of a newspaper advertisement by Spiegel, a mail order catalog house with a San Francisco outlet store, and requesting RCA to look into a possible "spite situation."[19]

The excluded testimony of Mr. Meyer shows that the cause of concern was that Spiegel was probably retailing merchandise below Meyer's cost (Meyer Dep., p. 31). He also testified that a letter informing RCA of the situation was the only action that could be taken, and he recognized that RCA would probably not even reply to that letter (Meyer Dep., p. 31).

The excluded deposition testimony of Mr. Maag was that he received Exhibit for Identification 784 and that some retail stores in San Francisco were upset by the Spiegel advertisement (Maag Dep., pp. 90-93).

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[19]The advertisement in question, which appeared in the San Francisco Call Bulletin of July 17, 1958, advertised an RCA television "regularly $219.95" for $148. This was below the price ($160.57) that Meyer *charged retailers* for the same model (Exh. 1963B).

Exhibit for Identification 783 is a letter from Spiegel outlet stores to Harry Glensor, an attorney for *Meyer,* stating:

> "In answer to your [Meyer's] letter of July 10, 1957 directed to the Spiegel Outlet Store. It is my understanding that the RCA Appliances are not Fair Traded.
>
> "Can you supply me with the forms stating what items are Fair Traded and at what Prices?"

There is simply no basis for appellants' intimation that this letter (which preceded Meyer's letter to RCA by a year) was in response to any protest *by RCA* that Spiegel "cease selling RCA products below suggested list prices" (App.Opn.Br., Appx. A, p. xxv).

None of this material concerning Spiegel shows that RCA participated in any plan to maintain retail prices in San Francisco or that RCA took any action in response to Meyer's concern. The most the excluded material shows is the natural concern by Meyer, the distributor, about a retail advertisement of a product below the price it charged retailers.

E. The District Court properly ruled that RCA field sales representatives were not "managing agents" of RCA.

Appellants also fail to support their assertion that the court erred in ruling that certain RCA field sales representatives were "managing agents" of RCA within the meaning of the Federal Rules (App.Opn.Br., pp. 169, 173). The record shows that an RCA field sales representative does not have any managerial responsibilities (Tr. 4757-4760). And the cases relied upon by appellants (App.Opn. Br., p. 173) are not contrary to the court's ruling. *Gibbs v.*

RCA Victor Distributing Corporation (W.D.Mo. 1963) 214 F.Supp. 52 held that the duties of employees of a foreign corporation as outlined in an affidavit were sufficiently broad to make him a general agent for the service of process under a civil procedure rule of Missouri. The court did not discuss the duties of the employee. *Newark Insurance Company v. Sartain* (N.D.Cal. 1957) 20 F.R.D. 583 held that an insurance agent who was held out to have broad powers concerning the issuance of insurance, the collection of premiums and the payment of claims was a "managing agent." RCA field sales representatives do not have such broad discretionary powers.

F. Since there is no evidence that RCA was a party to a conspiracy, declarations of employees of alleged "co-conspirators" were not admissible against RCA.

Appellants contend that certain excluded declarations were admissible against one defendant, and therefore should have been admissible against all defendants, including RCA (App.Opn.Br., p. 138). For example, appellants assert that the hearsay conclusory declaration attributed by appellants' president, Mr. Freeman, to Joseph Valenson if properly admissible against one defendant is also admissible against RCA (App.Opn.Br., p. 138). The asserted declaration contains no reference to RCA. The declaration was not admissible against RCA on a conspiracy theory because appellants have not shown that RCA was a party to any conspiracy.

Schine Theaters v. United States (1948) 334 U.S. 110, the case appellants rely upon (App.Opn.Br., p. 138), admitted "numerous interoffice communications" against all defendants only after a conspiracy between Schine and

those defendants was established by independent evidence (334 U.S. 116-117).

Similarly, this Court held in *Standard Oil Company of California v. Moore* (9 Cir. 1957) 251 F.2d 188, certiorari denied (1958) 356 U.S. 975, that such statements "are not to be considered as against other alleged members, unless there is independent evidence establishing, prima facie, that such others were members of the conspiracy" (251 F.2d 210).

In *Flintkote Company v. Lysfjord* (9 Cir. 1957) 246 F.2d 368, certiorari denied (1957) 355 U.S. 835, this Court held that statements made by a co-conspirator during the existence of the conspiracy and in execution of common design were admissible against all conspirators "if plaintiff had made a prima facie showing that there was a conspiracy and that Flintkote had joined the conspiracy" (246 F.2d 386). There has been no such showing in this case. Therefore, any declarations admitted or admissible against one defendant are not thereby admissible against RCA.

IV

THERE WAS NO ERROR IN THE DISTRICT COURT'S PRETRIAL ORDER OF AUGUST 13, 1965, WHICH DELINEATED THE ISSUES TO BE TRIED AND SEPARATED THE ISSUE OF LIABILITY FROM THAT OF DAMAGES.

Appellants attack the District Court's pretrial conference order of August 13, 1965 (R. 1608-1609) on two grounds: (1) that the court limited the issues to be tried to a "horizontal" conspiracy (App.Opn.Br., pp. 130-133);

(2) that the order separated the issue of liability from that of damages (App.Opn.Br., pp. 133-135).

The first ground is based upon a misconstruction of the order. There was no error with respect to the second ground. In any event, appellants could not have been prejudiced on either ground.

A. The District Court did not err in delineating the ultimate issues concerning liability.

Appellants erroneously claim that the trial court's pretrial order "limited the issues to be tried *solely* to a horizontal conspiracy to boycott the plaintiffs" (App.Opn. Br., pp. 130-131; emphasis by appellants). The order provides:

> "The ultimate issues to be tried in these actions on the issue of liability are as follows:
>
> "a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?
>
> "b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?" (R. 1609).

If appellants' interpretation of the pretrial order were correct, appellants could not have been prejudiced in their attempt to make a case against RCA. Appellants assert they were precluded from introducing evidence of a "ver-

tical'' conspiracy between RCA, Meyer and Hale to maintain and fix retail prices and to boycott appellants (App. Opn.Br., p. 131). Prior to the pretrial order in question (R. 1609), appellants filed an offer of proof stating the evidence relied upon to prove this asserted vertical conspiracy (R. 1481). None of the evidence mentioned in appellants' offer of proof was excluded at the trial on the basis of the pretrial order.[20] As heretofore shown, appellants have not produced any evidence which would allow a jury to infer that RCA conspired with anyone—horizontally, vertically or otherwise.

As the District Court pointed out,

> ''* * * The record is devoid of any evidence of an agreement between RCA and anyone to combine or conspire in the manner charged or in any other manner. Nor is there any evidence from which a jury could reasonably infer the existence of such an agreement or combination'' (R. 1925).

B. The District Court did not abuse its discretion by trying the issue of liability prior to the issue of damages.

The pretrial order of August 13, 1965, provides that

> ''These issues which relate to liability shall be tried and determined by way of special verdict before the issue of damages is tried before the same jury'' (R. 1609).

A separation of the issue of liability from that of damages is a matter for the judge's discretion under Rule

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[20]Much of the evidence was admitted; of the evidence excluded, most was excluded as hearsay, for lack of foundation, or for other reasons unrelated to the pretrial order. See, for example, discussion of Exhibits for Identification Nos. 343 and 344 (supra, pp. 26-27) relied upon by appellants in this regard (R. 1484).

42(b) of the Federal Rules of Civil Procedure *(Richmond v. Weiner* (9 Cir. 1965) 353 F.2d 41, 44; *Moss v. Associated Transport, Inc.* (6 Cir. 1965) 344 F.2d 23, 25).

The separation of the issues did not preclude appellants from producing any evidence relevant to proving a conspiracy, and they do not claim that any such evidence was improperly excluded because of the separation.

Not only is evidence of the extent of damages generally irrelevant to prove a conspiracy, but such evidence could not possibly have shown that RCA was a party to any alleged conspiracy.

This is not a case such as *United Air Lines, Inc. v. Wiener* (9 Cir. 1961) 286 F.2d 302 cited by appellants (App.Opn.Br., p. 135). In that case, the Court held that the issues of liability and damages could not be tried to *separate juries* because plaintiffs were suing for exemplary damages based upon the degree of culpability. Exemplary damages are not sought in this case and, in any event, the issues in the case at bar were to be tried by the same jury.

Haverhill Gazette Company v. Union Leader Corporation (1 Cir. 1964) 333 F.2d 798, also cited by appellants (App.Opn.Br., p. 134), has nothing to do with the present situation. The *Haverhill* case held that a master's finding of damages was inconsistent with the trial court's finding of liability.

V

THERE WAS NO ERROR IN THE DISTRICT COURT'S TAXATION OF COSTS TO RCA.

Appellants claim that the trial court erred in taxing for the benefit of the ten defendants the costs of one copy of the transcript of the pretrial proceedings and two of the five copies of the trial transcript which they shared at the trial (App.Opn.Br., p. 177). The court below ruled that it was necessary for the ten defendants to have two copies of the trial transcript "in view of the complicated nature of the case" (Tr. 6921). As this Court held in *Independent Iron Works, Inc. v. United States Steel Corp.* (9 Cir. 1963) 322 F.2d 656, 677-678, the need of counsel for a "complete, accurate, and readily available record of all these proceedings, both those during and before the actual trial, is readily apparent" (322 F.2d 678).

Appellants erroneously assert that the court below "taxed the costs for one copy of every deposition taken by appellants, and by appellees" (App.Opn.Br., p. 177). The court below disallowed many depositions (see, e.g., Tr. 6942-6943, 6963-6965, 6974-6975, 7019), and there was no error in its rulings with respect to the other depositions. The court below properly allowed appellees one copy of depositions taken by appellants of officers of parties to the litigation (Tr. 7004-7006), and one copy of depositions taken by appellants or appellees of witnesses who testified at the trial. These costs are in strict accord with the views expressed by this Court in the *Independent Iron Works* case, since those depositions might be used for impeachment (322 F.2d 678). The court

also allowed the cost of depositions taken by appellants which were used at the trial, because of the complexity of designations and the difficulty of reading the depositions into the record (see Tr. 6937-6941).

The court properly taxed reproduction of one copy of the exhibits for use by all of the defendants (Tr. 6924). The court ruled that "problems in connection with the exhibits," in particular, appellants' manner of using the exhibits throughout the trial, made it necessary for defendants to share a copy of the exhibits (Tr. 6924). Appellants have not shown that this cost was an abuse of discretion.

Appellants also claim (App.Opn.Br., p. 181) that the District Court improperly taxed the expenses of a deposition witness who traveled more than 100 miles for the purpose of having his deposition taken. Appellants apparently fail to note that, in the very case they cite, *Farmer v. Arabian American Oil Co.* (1964) 379 U.S. 227 (App. Opn.Br., p. 181), the Court recognized that a Federal District Court could, in an appropriate case, tax expenses for transporting witnesses more than 100 miles (379 U.S. 232). And this Court, in *Moylan v. AMF Overseas Corporation* (9 Cir. 1965) 354 F.2d 825, 829, held that travel expenses beyond the 100-mile subpoena provision were proper items for taxation against a losing party. In this case, the deposition witness was president of RCA Sales Corporation, a necessary and material witness. The court found that the appellants' taking of the deposition of this witness in San Francisco served appellants' convenience (Tr. 6980) and allowed the expenses (Tr. 6985). This was not an abuse of the court's discretion.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should affirm the judgment in favor of RCA.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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